

TANZANIA / JUDGMENT

ALEX SAWAKA JUDGMENT edited

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
CRIMINAL APPEAL NO 24909 OF 2024 (Originating from Criminal Case No 129 of 2023 of
Kinondoni District Court at Kinondoni dated 24th July, 2024 before W.Kaaya- SRM) ALEX MTEMA
SAWAKA.....APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

26th February & 19 March, 2025 MWANGA, J. The appellant before this Court was charged with three counts namely Rape, c/s 130 (1) (2) (e) and 131 (1), Unnatural offense contrary to section 154(1) (a) and (2), both of the Penal Code [Cap 16 R.E 2022], and impregnating a school girl contrary to section 60A (3) of Education Act [Cap 353 R.E 2002 as amended by Act No 2 of 2006. It was alleged by the prosecution that, on diverse dates between September 2022 and December 2022 in the Tegeta area within Kinondoni District in the Dar es Salaam region, 1 the appellant did have carnal knowledge of a girl aged sixteen years, a standard seven student at Kunduchi Primary School. (Name withheld for the sake of hiding her identity). The prosecution further alleged that, at the same period in the same area, the appellant did have sexual intercourse with the victim against the order of nature. And finally, the appellant, within the same period, impregnated the victim, a student of standard seven at Kunduchi Primary School. The brief background, as depicted in the proceeding, is as follows: The victim lives with his aunt at Tegeta Kwa Ndevu for his studies, while she left her parents in Tanga. At Tegeta, the victim met the appellant, who happened to be their neighbor. According to the victim, the appellant used to drag her into his room and rape her; he did that 5 times. It is further alleged that the appellant sodomized the victim. However, she did not explain the awful act done to her by the appellant, as the appellant threatened to publish that he raped and sodomized her in case she revealed the act. It appeared that, in March 2023, the victim's sister came from Njombe and found the victim pregnant. On 28 th March 2023, the victim and her relative reported the incident at Tegeta Police Station, where they were issued with Pf3. The victim was taken to Mwananyamala, where she was attended 2 by Kileo Gasper Elineema, a Medical Doctor (PW5,) whose findings revealed that the victim was no longer a virgin and had bruises on her private parts. Again, her anus was loose and had post-inflammatory healing scars; she was also confirmed to be 24 weeks pregnant. Findings were recorded in Pf3 and received in court as exhibit P3. The accused was arrested on the same date after a trap made by the victim. The case was then transferred to Mbweni Police Station, and he

was later arraigned in Kinondoni District Court to face his charges. When the charge was put to him, the accused pleaded not guilty to all counts, which prompted the prosecution to parade six witnesses and tender three exhibits to establish the accused's guilt. On his behalf, the appellant relied on his testimony and that of one other witness. He also tendered one exhibit, a birth certificate. After a full trial, the court was convinced that the prosecution failed to prove the second count of unnatural offense, thus acquitting the appellant on that count. On the other two counts of rape and impregnating a schoolgirl, the trial court had a view that the same was proved to the hilt. Thus convicted, the appellant was on those counts and sentenced to serve thirty years imprisonment for the first count of Rape and six years imprisonment for the 3 third count of impregnating a schoolgirl. The sentence had to run concurrently. Displeased, the appellant is before this temple of justice trying to challenge his conviction and sentence fronting eight grounds of grievances as summarized hereunder:

1. That there was a contradiction in the victim's age as per the evidence on the PF3 (Exhibit P3) and in PW3's evidence.
2. That the evidence of PW5 and PW6 was taken without an oath or affirmation contrary to the provision of section 198(1) of Cap 20 R.E 2022 and section 3 of Oaths and Statutory Declaration Cap 34 R: E 2019.
3. That the DNA test was acquired contrary to the legal procedures.
4. That the victim was under the age of eighteen years as per Exhibit DE-1 (the birth certificate) tendered by DW2 and admitted in Court without any objection from the prosecution side.
5. That the trial was conducted by two Magistrates, Hon. Rweikiza, SRM, and Kaaya SRM, but the provision of Section 214(1) of CAP 20 R.E 2022 was not complied with.
6. That Pw3 has failed to prove her credentials that she has gone to 4 teachers' college and that she was a teacher.
7. That the Learned Magistrate erred in law and fact by convicting the appellant without drawing an inference adverse to the prosecution for failing to trace/ and or summoned the PW1's guardian to testify in the court to prove the facts in issuing the omission, which cast a serious doubt in the prosecution case.
8. That the prosecution case was not proved to the required standard. On the strength of the said grounds of appeal, the appellant prays this Court to allow the appeal, quash the conviction, set aside the sentence, and set him free from prison. The hearing of the appeal took the form of a written submission in which all parties were represented. The appellant hired the services of Mr. Geoffrey Luyanji, learned Counsel. Ms. Phoibe Magiri, the State Attorney, represented the respondent. In his submission, the appellant prayed to submit the grounds of appeal in seriatim. However, he consolidated grounds 6, 7, and 8 of the appeal. On the other hand, Ms. Magiri responded to the grounds of appeal as submitted. So, in this Judgment and to properly determine the said eight grounds, I will address the grounds as submitted by the parties. In support of the 1st ground of appeal, Mr.Luyanji submitted that

the evidence adduced in the trial Court regarding the age of the victim by the 5 prosecution was at variance and /or in contradiction with the particulars of the offense. The charge was never amended in accordance with the provisions of Section 234 (1) of the Criminal Procedure Act [CAP 20 R.E 2022]. He contended that the prosecution evidence was incredible. He said the PW3's evidence was supposed to be taken in compliance with the provision of Section 127 (2) of the Evidence Act [CAP 6 R.E 2022]. He submitted that it is an elementary principle of law that for the Court to rely solely on the testimony of the child of tender age or the victim of the crime to sustain a conviction in respect of sexual offense, it must satisfy itself upon assessment of credibility, truthfulness and reliability of such evidence that the witness in question is telling nothing but the truth. To cement his argument, he cited the case of Mohamed Said vs. Republic, Criminal Appeal No. 145 of 2017(unreported) on page 15, stressing that word of the victim of a sexual offense should not be taken as Gospel truth but that her/his testimony should pass the test of truthfulness. He contended that PW1's age was not proved beyond all reasonable doubt whether PW1 (victim) was 13, 14, 15, 16, or 17 years old or above despite it being one of the material ingredients in rape cases. He argued that looking at the evidence of PW1, PW2, PW3, PW5, and PW6, it is apparent that (PW1's) evidence was in a big doubt which doubt can be resolved by a clinic 6 card or certified birth certificate. It was his submission that taking the evidence of PW1, on oath/affirmation contravened the provision of law/procedures of law. Therefore, the PW1's evidence lacked evidential value and was liable to be expunged from the records. He contended further that, as per PW 2 (father of the victim), PW 1 was born 8th October 2007, and she was sixteen years of age, but exhibit PE 3(PF3), which was tendered in Court by PW5, shows that the said incident was reported on police on 29th march 2023 and that PW1 was fifteen years of age. He contended that, in simple arithmetic, when PW1 and PW2 came to adduce their evidence in Court, if it is true that PW1 was born on 8th October 2007, then PW1 had not attained sixteen years of age. It's to be noted that in statutory rape, the age of the victim is the most crucial component in proving the charge against an accused person. Once it is seen that the issue of the victim's birth date is doubtful, then it cannot be said that the age has been proven or the case has been proven unless there is other independent evidence to prove the same. He implores the court to find that the evidence produced by the prosecution was insufficient proof beyond a reasonable doubt, as required by law. Hence, find this ground alone sufficient to resolve the entire appeal on its merit. 7 In reply, Ms. Magiri submitted that in the case of Isaya Renatus (supra), the Court of Appeal amplified that evidence on proof of age may be given by the victim, relative, parent, medical practitioner, or, where available by the production of birth certificate. Stressing on that position and who can prove the age of the victim. She went on to submit that when PW1 was giving her testimony, she clearly stated her age is 16 years; her father PW2 stated the same, and they both gave the same dates of her birth to be 8th October

2007. PW1 and PW2, under the circumstances, are the only persons who can give the correct age. She was of the view that, the contradiction that the appellant posed was immaterial since other witnesses had to refer to and did not know her age; Doctor PW5, the medical doctor,

did not conduct any test to ascertain the age of the victim in these circumstances hence her mistake to state the exact date of the victim is an honest mistake same goes to PW3 who also said she was simply told. She argued that the Trial had the opportunity to see the PW1 and assess her; it did not doubt that the victim was a child below 18 years of age, and that alone is enough to prove she is a minor. She was insistent that PW1 is a credible witness, as she has maintained from the very beginning it is the appellant who raped and impregnated her. The evidence PW5 and PW4 came to confirm that she was really raped and 8 impregnated and that the person who is father is the appellant after conducting a DNA test. Concerning the issue of noncompliance to the provisions of section 127

- (2) of Cap 6) she countered that PW1 was not under the age of 14 years and thus cannot be termed as a child of tender age; she was of the view that appellants submission has no merit hence implored the court to dismiss the same. She maintained that, since PW1 gave her evidence under affirmation, her testimony does carry evidential value. In a brief rejoinder, Mr. Luyanji had nothing helpful to add beyond reiterating his submission in chief. I have keenly considered both parties' submissions and the lower court record. In my view, this ground need not detain this court. The reasons I so hold are that, in proving the instant case, the victim's age was paramount. In proving the age, the law is evident. This can be demonstrated by the victim, a relative, a parent, a medical practitioner, or, where available, by the production of a birth certificate. The position is articulated in the court of appeal case of *Isaya Renatus vs Republic*, Criminal Appeal No. 542 Of 2015, CAT at Bukoba (Unreported) 9 "We are keenly conscious of the fact that age is of great essence in establishing the offense of statutory rape under section 130(l)(2)(e), the more so, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate." In the present appeal, it is apparent that PW1, the victim, testified that she was 16 at the time of trial, and that was confirmed by the victim PW2, who confirmed that the victim was born on 8 th October 2007. To me, that is enough to prove that the victim was under the age of 18 because, under the circumstances, PW1 and PW2 are the only persons who could give the correct age. Thus, this ground is destitute of merit, and the same is dismissed immediately. Next is the second ground of appeal, where the appellant contends that the evidence of PW5 and PW6 was received without taking an oath /affirmation of the omission, which violated the provisions of Section 198(1) of the Criminal Procedure Act, Cap 20 R.E 2022 and Section 3 of the Oaths and Statutory declaration [CAP 34 R.E 2019]. In this, Mr. Luyunji submitted that the omission is fatal and incurable, hence rendering the evidence of PW5 and PW6 null and void. He, thus, urges this Court to disregard the evidence 10 of PW5 and PW6 for lack of evidential value. To bolster his position, he cited the case of *Abas Kondo Gede vs. Republic*, Criminal Appeal No. 472 of 2027 (Unreported). Responding to this ground of appeal, Ms. Magiri acknowledged that PW5 and PW6 did not take an oath or affirm before giving their evidence; however, the original records indicate that they did take an oath. It was her submission that, if this court were to rely on the said records in the system, then it is her

prayer that the court order a trial for Lenovo in respect of the witness who did not take the oath, especially considering that the evidence against the accused is watertight. It is an indisputable fact that the evidence of PW5, the medical doctor, and PW6, the investigator, was taken without oath or affirmation. It is a mandatory requirement under Section 198(1) of the CPA that a witness must be sworn or affirmed before their evidence is recorded. For clarity, the section states that; Section 198 – “(1) Every witness in a Criminal Cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory 11 Declarations Act” Since the record does not indicate that PW5-PW6 was sworn or affirmed, the recording of their evidence contravenes the above-quoted provision of the law. The effect of the omission is to render their evidence invalid. This position was enunciated in the Court of Appeal case of *Mwami Ngura v. The Republic*, Criminal Appeal No. 63 of 2014 (unreported), where the Court was dealing with the situation of a child of tender years who understood the nature of an Oath but was not examined under Oath. It stated as follows on the omission: “...as a general rule, every witness who is competent to testify must do so under oath or affirmation unless she falls under the exceptions provided in a written law...one such exception is section 127 (2) of the Evidence Act. But once a trial Court, upon an inquiry under section 127 (2) of the Evidence Act, finds that the witness understood the nature of the oath, the witness must take an oath or affirmation. If this is not done, such evidence must be visited by the consequences of non-compliance with section 198 (1) of the CPA. And, in several cases, this Court has held that if, in a criminal case, evidence is given without an oath or affirmation in violation of section 198(1) of the CPA, such testimony amounts to no evidence in law. [see eg. *MWITA SIGORE @ OGOPA v. REPUBLIC*.” (Emphasis added) 12 See also the case of *Khamisi Samweli v. The Republic*, Criminal Appeal No. 320 of 2010. In the present case, therefore, since PW5 and PW6, who were competent witnesses, were not, according to the record, examined on oath or affirmation, their testimony is of no evidential value. The same deserves to be expunged from the record, as I hereby do. Having discarded the evidence of PW5 and PW6, the question that follows is whether the remaining evidence on record is sufficient to sustain the appellant's conviction. By expunging the evidence of PW5 and PW6, the remaining evidence consists of that of PW1, the victim; PW2, the victim's father; PW3, the Victim's teacher; and PW4, the Government Chemist. Undoubtedly, the appellant was charged with the offense of raping a 16 years old school girl contrary to, among others, sections 130 (1), (2) (e), and 131 (3) of the Penal Code. In essence, for the prosecution to secure a conviction in this category of rape, they have to prove that the victim was a child under 18 years of age and that she was carnally known by the appellant. There are plenty of cases supporting the above stance, such as the case of *Robert Andondile Komba vs. DPP*, Criminal Appeal No. 465 of 2017, *George Claud Kasanda vs DPP* Criminal Appeal No 376 of 2017 CAT at 13 Mbeya, *Isaya Renatus vs. Republic*, (supra) Examining the remaining evidence, there is no indication of dissatisfaction with their account of the incident, and it lacks credibility in their testimony. For instance, the evidence of the victim was straightforward; she gave a detailed account of how the appellant used to rape her and finally impregnate her, and on being cross-examined, PW1 was consistent that

it was the appellant who raped her and impregnated her. The evidence of PW4 Government Chemist corroborated her evidence and exhibit P2 Government Chemist report on DNA that the appellant is the father of the victim's baby. Further corroboration came from Pw3, the victim's teacher, and exhibit P1, the school attendance report. The appellant evidence could not discredit the evidence of PW1 at all. Thus, in my profound view, the remaining evidence can be used to ground the conviction of the appellant. Next for consideration is the 4th ground of appeal in which the appellants submitted that the Trial Court wrongly rejected the appellant's defense that he was below eighteen of age while he produced his birth certificate, which was not objected to by the prosecution. He was of the view that the Court did not even comply with the provisions of Section 113(1)(2)(3) of the Law of the Child Act, [CAP 13 R.E 2019] on determination of age. He 14 quoted the provision of Section 113(1) of the Law of the Child Act and submitted that since the Court did not comply with the provision of Section 113(1)(2)(3) of the Law of the Child Act (supra) the sentence imposed on the appellant was quite improper and/ or illegal. In that bid, the trial Court was also supposed to consider and determine the provisions of Section 119 of the Law of the Child Act, [CAP 13 R.E 2019] and Section 131(2)(a)(b)(c) of the Penal Code, (CAP 16 R.E 2022]. Inevitably, the failure of the Trial Court to comply with the above-mentioned Sections of law makes the findings of the trial Court unfair and/or illegal against the appellant. He thus urges the Court to find this ground to have merit and allow it to sail through. In addition, he submitted that the accused person informed the court that he was 17 years old, even though he did not raise that concern during the preliminary Hearing. This concern was supposed to ring the bell in the ears of the court, as the jurisdiction of the court was at issue. He held the view that, since the accused person was a 17-year-old child, they should not be subjected to the jurisdiction of a trial court but rather to a juvenile court, as per the provisions of Section 98 of the Child Act. He finally prays that the court be pleased to see merit in this ground of appeal. Responding to this ground of appeal, Ms. Magiri submitted that this ground has no merit since the appellants' evidence regarding age is marred 15 with contradiction. She submitted that, when he was giving his defense, the appellant stated he was 22 years. The offense occurred in 2022 and 2023, which would have made the appellant 20 years old and, thus, still not a minor. She contended that Exhibit D2 was not read over in court and, hence, should be expunged. In her view, neither DW1 nor DW2 knew the age of the appellant. She had a view that the appellants were only using their defense of age as a means to escape responsibility; she thus prays that this court disregards this ground of appeal. In a brief rejoinder, Mr. Luyanji contended that the trial court's failure to comply with the provisions of sections 113 and 119 of the Law leaves considerable doubt, which should be resolved in the appellant's favor. I have canvassed the parties' arguments for and against this ground of appeal and critically reviewed the trial Court records and the case laws relied upon to establish the merit of this ground. The issue for determination is whether the appellant's age was established. According to the record, the charge sheet indicates that the appellant was 22 years old at the time of the crime's commission. However, as reflected in the proceedings managed by eCMS of 15th July 2024, the appellant informed the court that he was born on 10th July 2006. Dw2, his brother, cemented the same and tendered birth 16 certificates to

strengthen their evidence. However, the trial magistrate disregarded such evidence, reasoning that the appellant had admitted his age during the preliminary hearing and thus proceeded to sentence him to 30 years. Imprisonment. To me, this was not proper. If the court was not satisfied with that evidence, it had to conduct an inquiry on the accused's age as per section 113 (1) of the Child Act which "113.-(1) Where a person, whether charged with an offense or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person". In my view, at the time the appellant introduced himself to the court as being under 18, the trial court was required to inquire about his age to ensure whether it had jurisdiction, as children in conflict with the law are tried in juvenile courts, as per Section 98(1) of the Child Act. Notwithstanding this, the law regarding children under section 119 of the Child Act prohibits custodial sentences, as outlined in the Penal Code. Since the appellant was under 18, the law is very clear on the punishment to be imposed. Section 131 of the Penal Code, which is a sentencing section on rape cases, provides for the sentence to be given to a child offender of 18 years or less. 17 The same provides that; "131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for the imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall, in addition, be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offense was committed for the injuries caused to such person.

- (2) Notwithstanding the provisions of any law, where the offense is committed by a boy who is of the age of eighteen years or less, he shall-
 - (a) if a first offender is sentenced to corporal punishment only
 - (b) if a second-time offender is sentenced to imprisonment for a term of twelve months with corporal punishment,
 - (c) if a third-time and recidivist offender, he shall be sentenced to five years with corporal punishment.
- (3) Subject to the provisions of subsection (2), a person who commits an offense of rape of a girl under the age of ten years shall, on conviction, be sentenced to life imprisonment". The record of this appeal does not reflect that appellant was the second or third offender. This suggests that he was the first offender, as per the proceedings of 24/07/2024. Since the appellant has been in jail since July 24, 2024, in contravention of the law, I see no need to order a retrial at the 18 Juvenile Court or replace his sentence; instead, I hereby set aside the sentence of 30 years on the first count and the 6-year imprisonment on the third count. In the aftermath, I order his release from custody unless otherwise lawfully held. It is so ordered accordingly. Dated at Dar es Salaam this 19th day of March 2025 H.R. MWANGA.
JUDGE 19/03/2025 COURT: Judgment delivered at Dar es Salaam in chambers this 19th March 2025 in the presence of Mr. Rajab Hussein advocate for the appellant and Mr. Michael

Moboko, learned State Attorney. H.R. MWANGA. JUDGE 19/03/2025 19 20

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